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IN THE

Supreme Court of the United States

October Term, 1974

HAROLD FRANKS AND JOHNNIE LEE, *Petitioners*,
v.
BOWMAN TRANSPORTATION COMPANY, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

J. ALBERT WOLL
ROBERT C. MAYER
736 Bowen Bldg.
815 Fifteenth St., N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for AFL-CIO

MICHAEL H. GOTTESMAN,
ELLIOT BREDHOFF,
ROBERT M. WEINBERG,
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

BERNARD KLEIMAN,
CARL FRANKEL,
Five Gateway Center
Pittsburgh, Pa. 15222

JEROME A. COOPER,
JOHN C. FALKENBERRY,
409 North 21st Street
Birmingham, Ala. 35203

JAMES W. DORSEY,
100 Peachtree Street, N.W.
Atlanta, Georgia 30303

Attorneys for USWA

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BRIEF FOR RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

This brief is filed jointly by respondent United Steelworkers of America, AFL-CIO (hereinafter referred to as "USWA"), and by American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae* (hereinafter referred to as "AFL-CIO").[1]

USWA, which is the AFL-CIO's largest affiliate, is the collective bargaining representative of the employees of respondent Bowman Transportation Company (hereinafter "the Company"). AFL-CIO is a federation of 111 labor

[1] USWA and AFL-CIO file this statement of their common position in a single brief for the convenience of the Court. All parties have furnished written consent to AFL-CIO to file an *amicus curiae* brief.

organizations, with a combined membership of 14 million.

Both AFL-CIO and USWA actively supported the enactment of Title VII of the Civil Rights Act of 1964. President Meany, testifying in support of its passage, declared:

> "The leadership of the AFL-CIO, and of the separate federations before merger, has been working ceaselessly to eliminate those prejudices. The leaders of every affiliated national and international union are enlisted in the same effort. We have come a long way in the last 20 years—a long way farther, I might say, than any comparable organization, including the religious organizations as a whole, and certainly we are a generation or more ahead of the employers as a whole.
>
> "But we have said repeatedly that to finish the job we need the help of the U.S. Government. • • • When the rank-and-file membership of a local union obstinately exercises its right to be wrong, there is very little we in the leadership can do about it, unaided. • • •
>
> "In short, I am not here to ask for special exemptions for unions; quite the contrary. I hope the law you draft will cover the whole range we ourselves have written into our constitution and we hope you will make sure that the law will also apply to apprenticeship programs of every kind, as I urged this very committee last August."[2]

Both USWA and AFL-CIO have labored diligently to bring employment practices throughout American industry into compliance with Title VII, and to secure judicial interpretations which effectuate Title VII's statutory objectives.[3]

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[2] EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 [hereinafter "Leg. Hist."] pp. 2158-59. The President of USWA had likewise testified in support of enactment of Title VII. *Id.* 3242. See also Bayard Rustin, the Blacks and the Unions, Harper's Magazine, May, 1971, pp. 73, 76.

[3] For example, USWA filed a brief *amicus curiae* in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, urging the statutory interpretation which this Court adopted, and USWA initiated the negotiations leading to the industry-wide decree bringing employment practices in the steel industry into compliance with recent judicial interpretations of Title VII. See *U.S.* v. *Allegheny Ludlum Industries,* 8 FEP Cases 198, 63 F.R.D. 1 (N.D. Ala., 1974). USWA's role in integrating the two largest southern steel plants, prior to passage of Title VII, is recounted in *U.S.* v. *United States Steel Corp.*, 371 F. Supp. 1045, 1055 and particularly n. 23 thereat, 1060 n. 39, 1062 (N.D. Ala. 1973), and *Whitfield* v. *United Steelworkers,* 263 F.2d 546 (5th Cir. 1959).

ADDITIONAL STATUTORY PROVISION INVOLVED

We believe that another provision of Title VII of the Civil Rights Act of 1964, not reproduced in the brief for petitioners, is important to the analysis of this case. Section 703(j), 42 U.S.C. § 2000e-2(j) provides:

> "(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

COUNTER-STATEMENT OF THE CASE

We accept petitioners' statement of the case, but believe

the Court should have additional information respecting the role of the Union.

Until 1967, the Company's employees were unorganized. International Union of District 50 (hereinafter "District 50") had sought to organize the employees previously, but had been rejected in an NLRB-conducted election (43a). The employment conditions which prevailed during this non-union period were aptly described in the decision of the court below: the Company had "followed a conscious policy of keeping its employees segregated according to race," had "prohibited inter-departmental transfers flatly," and had discriminated against some blacks in hiring, 495 F.2d at 409-411.[4]

In 1967, District 50 succeeded in organizing the employees, was recognized by the Company as their bargaining representative, and commenced negotiations with the Company for a first collective bargaining agreement (43a). In accordance with its long-standing policy that "company-wide seniority is the only true seniority," District 50 proposed that the Company convert its seniority system from departmental seniority to company-wide seniority, that all job vacancies be posted, that transfers be allowed on the basis of plant seniority, and that the Company henceforth assign newly-hired employees to all departments "without regard to race" (44a; 495 F.2d at 410-411). The Company agreed to abolish its no-transfer policy, and to assign new employees without regard to race. (495 F.2d at 410-411). The Company refused, however, to substitute company-wide seniority for departmental seniority, or to post notices of job vacancies (44a-45a). District 50, convinced that it

[4] The Company was willing to hire blacks who would accept assignment to the historically "black" jobs, but refused to hire those whose sole interest was in "white" jobs. *Id.* at 411.

could not conduct a successful strike, acquiesced in an agreement which preserved the departmental seniority system and did not provide for posting of job vacancies (44a; 495 F.2d at 410-411).

The 1967 agreement provided for a reopener, without the right to strike, in 1968. In the negotiations pursuant to that reopener, District 50 again demanded company-wide seniority and posting (45a). This time, the Company agreed to the posting of job vacancies, but it again refused to convert to company-wide seniority (45a).

The Company had exclusive authority in determining who would be hired (45a). The Company continued to discriminate against blacks in hiring until 1972. 495 F.2d at 411.

In 1972, District 50 merged with USWA. Accordingly, USWA has succeeded District 50 as the employee's bargaining representative, and as the union-respondent in this case.

This suit sought relief for two groups of workers: blacks who were hired when they first applied but who were assigned discriminatorily to jobs in the Company's less desirable departments, and blacks who were discriminatorily denied employment altogether when they first applied.

The decision of the court below granted the first group—those discriminatorily assigned—all of the relief they sought. The court held that these employees were entitled not only to back pay, but also to the right which District 50 had sought unsuccessfully in negotiations: to transfer to other departments with "the use of full company seniority for transfer purposes . . . and for all purposes after transfer in the new department" (495 F.2d at 416). The Company's petition for certiorari from this portion of the

decision below was denied, 43 L.W. 3330 (1974).

The decision below did not, however, fully cure the discrimination visited upon those who had initially been rejected for employment solely because of their race. While the decision accorded these employees back pay for the period during which employment had been discriminatorily withheld, it denied their request that they be awarded the earlier seniority dates which they would have enjoyed absent discrimination. *Id.* at 417-418. We agree with petitioners, and demonstrate herein, that the court below erred in not granting the seniority relief requested.

ARGUMENT

Introduction and Summary

It is often said that hard cases make bad law. But easy cases can also make bad law, if the apparent correctness of a particular result deflects attention from the importance of the path by which that result is reached. Mr. Justice Jackson once made the point with characteristic grace in a concurring opinion:

> "I part company with the Court as to the road we will travel to reach a destination where all agree we will stop, at least for the night. But sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge."[5]

We agree with petitioners that they are entitled to the seniority relief which they seek. We believe, however, that petitioners have arrived at the correct result through an analysis of Title VII which is incomplete, in that it does not focus upon the basic objectives which guided Congress in structuring that statute.

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[5] *First National Bank of Chicago* v. *United Airlines*, 342 U.S. 396, 398 (1952).

As we will develop herein, Congress had two very clear objectives: (1) to forbid discrimination and to make whole those who suffered discrimination; (2) not to confer preferential rights upon minorities, either in the substantive or remedial provisions of the Act.

In our view, these two objectives lead to a dichotomy between "make whole" remedies, which fully implement the Congressional design, and "preferential" remedies, which Congress clearly intended to forbid. In the seniority context, there are two types of remedies which would be "preferential": (1) conferring enhanced seniority upon individuals who are not discriminatees, i.e., who have not been denied employment or perquisites of employment by the defendants on account of race, creed, color, sex or national origin; and (2) conferring seniority rights upon discriminatees beyond those necessary to place them in the positions they would be occupying had there been no discrimination.

Petitioners are entitled to the relief they seek because that relief is "make whole," not "preferential." Were this Court to reverse the decision below, however, without recognizing the "cutting line" drawn by Congress, its opinion might suggest that other cases be decided in a manner inconsistent with the Congressionally intended scheme. This concern is not hypothetical, for there is already on this Court's docket a case (*Waters* v. *Wisconsin Steel Works*, No. 74-1064, petition for certiorari pending) in which a "preferential" remedy is sought, but which counsel for the *Waters* petitioners (who are also counsel for petitioners here) assert poses "the same" issue in substance as that in the instant case.[6]

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[6] Reply Brief in Support of Certiorari in *Waters*, p. 1. The perti-

We begin by analyzing the relevant legislative materials and showing that they demonstrate that the dichotomy just noted is an accurate distillation of the Congressional intent. We then draw the lessons which Title VII, read against the background of its history, provides for this case, and for cases such as *Waters*.

I. The "Rightful Place" Remedy Sought By Petitioners Is Called for By the Congressional Scheme

A. The Congressional Policies which Bear Upon the Fashioning of "Seniority" Remedies under Title VII

The basic principles governing the fashioning of relief for Title VII violations were articulated by this Court in *Albemarle Paper Co.* v. *Moody*, 43 L.W. 4880 (June 25, 1975). *Albemarle* involved the remedy of back pay, but the sentence of § 706(g) which the Court there construed authorizes back pay and other equitable relief in the same terms.[7] As this Court made clear in *Albemarle*, the discretion vested in district courts by § 706(g) must be exer-

nent paragraph, in full, states:

> "As respondents properly recognize, the certworthiness of Questions 1 and 2 involves the relationship of the Seventh Circuit decision in the instant case to the Fifth Circuit decision in *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir., 1974), cert. granted 43 U.S.L.W. 3515 (1975), No. 74-728. Both the Fifth and Seventh Circuits held that "last hired, first fired" seniority systems were immune *per se* from legal attack. The Fifth Circuit reached this result by holding that it lacked the power to give an aggrieved employee the necessary relief, seniority retroactive to the date on which he was denied a job because of his race. The Seventh Circuit reached this result by holding that such a seniority system was, *as a matter of law*, non-discriminatory. The substance of the Fifth and Seventh Circuit rules is of course the same."

[7] Section 706(g), first sentence, provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate."

cised consistently with "the purposes which inform Title VII" (43 L.W. at 4883-84). The essential first step in resolving this case is, therefore, to identify those Congressional objectives which bear upon the formulation of "seniority" remedies.

The court below held that § 703(h) precludes awarding seniority to a discriminatee for any period prior to his actual date of hire. Respectfully, we submit that because the court below failed to focus on the broad design of Title VII, it construed that one section out of context and imported to it a meaning quite different from that intended by Congress. As we show, the central concern which preoccupied Congress in drafting Title VII was to be sure that it had made sufficiently plain the line between abolishing discrimination, which was its goal, and providing preferential treatment, which all members wished to preclude. The debate on the floor of Congress was not over whether that line should be drawn—everyone agreed that it should—but over what language was necessary to make that line unmistakably clear. Section 703(h) is but one of several provisions added to confirm this Congressional purpose. Properly construed, it precludes only "preferential" treatment. It does not preclude any remedy which—as we later show is involved here—merely accords a proven vic-

tim of discrimination his "rightful place": the place in the seniority system which he would be occupying but for the prior discrimination against him.

The drafters of the original bill which eventuated in Title VII sought to make explicit that remedies would be available only to those who established that they were victims of discrimination. The basic liability provisions, §§ 703(a), (c), speak of discrimination "against any individual," and the key remedial provision, § 706(g), states in its last sentence that courts may not furnish remedies to "an individual" unless he has proven that he has suffered employment disadvantage "on account of race, color, religion, sex or national origin."[7a] The drafters believed

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[7a] Section 703(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The last sentence of Section 706(g) provides:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a). [Section 704(a) forbids retaliation against employees for asserting their rights under Title VII].

that these provisions, standing alone, made clear the dual Congressional objectives: on the one hand, to forbid discrimination and make discriminatees whole; on the other, to preclude preferential treatment of minorities *qua* minorities. As Senators Clark and Case, the floor managers of Title VII in the Senate, explained:

> "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section 707(c) [enacted as 706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex or national origin."
>
> • • • •

> "There is no requirement in title VII that an employer maintain a racial balance in his work force. * * * It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against."[8]

But notwithstanding the clarity of the bill's original language, there developed a national tide of concern that Title VII would confer preferential rights upon minorities at the expense of the majority. Two basic fears were voiced again and again: that Title VII would force employers to hire minorities pursuant to quotas in order to achieve racial balance, and that minorities when hired would be given special seniority rights boosting them ahead of incumbent whites.

The alarums were first sounded in the Minority Report accompanying the House Judiciary Committee's Report recommending adoption of Title VII. The minority members asserted that the bill "under the cloak of protecting the civil rights of certain minorities, will destroy civil rights of all citizens of the United States who fall within its scope."[9] They listed a number of interests which would be "seriously impair[ed] by the passage of the bill."[10] Among these were the "seniority rights of employees in corporate and other employment."[11] They warned that

[8] Leg. Hist. 3044, 3040.

[9] Leg. Hist. 2064.

[10] *Ibid.*

[11] *Id.*, 2065.

Title VII "would destroy seniority."[12] They asserted that the bill's "true interest and purpose" was to achieve racial balance, not merely to end discrimination.[13] Dramatizing the threat to seniority which they perceived, the minority members declared:

> "*The provisions of this act grant the power to destroy union seniority.* The action of the Secretary of Labor already mentioned is merely the beginning, if this legislation is adopted. With the full statutory powers granted by this bill, *the extent of actions which would be taken to destroy the seniority system is unknown and unknowable.*
>
> "To disturb this traditional practice is to destroy a vital part of unionism. Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority, but of the stipulated race. And if the union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must then go into the street and recruit members of the stipulated race in sufficient number to comply with Federal orders, else his local could be held in violation of Federal law.
>
> "Neither competence nor experience is the key for employment under this bill. Race is the principal, first, criterion."[14]

These accusations prompted a number of the bill's sponsors in the House to submit a statement of "additional views," in which they sought to allay the fears which the minority members had voiced:

[12] *Id.*, 2066.

[13] *Id.*, 2067-68.

[14] *Id.* 2071 (emphasis in original).

"It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification." [15]

The sponsors' reassurances proved sufficient in the House, which passed the bill without material change. But in the Senate a filibuster began on March 9, 1964 and continued for more than three months.[16] That filibuster fed on the fear that Title VII was intended "to rob all Americans of important rights for the benefit of a segment of the population." [17] The emotional climate was accurately depicted by Senator Clark, one of the floor managers of Title VII:

> "There has been so much oratory, and so many really extravagant statements have been made about what Title VII does, that it is perhaps difficult to speak objectively and carefully about what the title is intended to do, without being diverted into an effort to rebut some of what can only be called fantastic misstatements about what the title does, which have been made from time to time, not only on the floor of the Senate but also by a large number of individuals serving in the press corps, without their having taken the trouble to read the title or being quite careless in what they had to say about it." [18]

[15] *Id.* 2150.

[16] *Id.* 3092.

[17] *Id.* 3092.

As the filibuster entered its second month, Title VII's sponsors submitted three written explanations of the bill designed specifically to quiet the fears that Title VII would require racial quotas and grant special seniority rights to minorities. Senators Clark and Case, the floor managers, submitted an interpretative memorandum addressed to these fears. They explained that Title VII did not mandate racial balance, indeed it forbade "any deliberate attempt to maintain a racial balance":

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. * * *" [19]

With respect to the fears concerning seniority, the memorandum declared:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them

[18] *Id.* 3092.

[19] *Id.* 3040.

special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)" [20]

Senator Clark also introduced a statement prepared by the Department of Justice "in rebuttal to the argument made by the Senator from Alabama [Mr. Hill] to the effect that Title VII would undermine the vested rights of seniority * * * and that Title VII would impose the requirement of racial balance." [21] The Department of Justice memorandum stated:

"First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discriimnation based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as

[20] *Ibid.*

[21] *Id.* 3244.

the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

* * * *

"Finally, it has been asserted that title VII would impose a requirement for 'racial balance.' This is incorrect. There is no provision, either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. The same is true of labor organizations. On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all." [22]

Finally, Senator Clark submitted a series of written answers to questions which had been proffered by Senator Dirksen as to the meaning of the bill. With respect to

[22] *Id.* 3244-45.

seniority the pertinent question and answer were as follows:

> "Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> "Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race." [23]

With respect to the concern that the "bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area," Senator Clark responded: "Quotas are themselves discriminatory." [24]

Despite these efforts to set fear at rest, it became necessary, in order to secure sufficient votes to end the filibuster, to include express language dealing with the subjects of racial balance and seniority (the present §§ 703(j) and (h)) as part of the package of amendments known as the Mansfield-Dirksen compromise. Senator Humphrey explained the sponsors' reason for accepting § 703(j):

> "* * * A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning." [25]

[23] *Id.* 3013.

[24] *Id.* 3015.

Section 703(h), Senator Humphrey declared, served the same purpose with respect to the fears which had been advanced concerning seniority:

> "A new subsection 703(h) has been added, providing that it is not an unlawful employment practice for an employer to maintain different terms, conditions, or privileges of employment either in different locations or pursuant to a seniority, merit, or other incentive system, provided the differences are not the result of an intention to discriminate on grounds of race, religion, or national origin. * * * [This] change does not narrow application of the title, but merely clarifies its present intent and effect." [26]

Even after these changes had been approved, Senator Ervin moved to strike Title VII from the Civil Rights Act on the ground that it unconstitutionally deprived white employees of equal protection. Senator Clark responded:

> "Mr. President, this title would not deprive anyone of any rights. All it does is to say that no American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right of equal job opportunity.
>
> "The bill does not make anyone higher than anyone else. It establishes no quotas. It leaves an employer free to select whomever he wishes to employ. It enables a labor union to admit anyone it wishes to take in. It

[25] *Id.* 3005.

[26] *Ibid.*

tells an employment agency that it can get a job for anyone for whom it wishes to get a job.

"All this is subject to one qualification, and that qualification is to state: 'In your activity as an employer, as a labor union, as an employment agency, you must not discriminate because of the color of a man's skin. You may not discriminate on the basis of race, color, religion, national origin, or sex.'

"That is all this provision does. It would establish a legislative civil right for what has always been a sacred American constitutional right, the right to equal protection of the laws. That phrase does not come from the commerce clause, but the philosophy behind it is the philosophy behind the fair employment practice title.

"It merely says, 'When you deal in interstate commerce, you must not discriminate on the basis of race, religion, color, national origin, or sex.'

> "Title VII as it presently exists, and as modified—as many of us agreed, reluctantly, including myself, that it should be modified by the Dirksen amendment—is one of the mildest Fair Employment Practices acts ever to be brought before the Congress." [27]

The legislative history thus confirms that while Congress wanted the proven victims of discrimination to be made whole, it did not want anyone to receive preferential treatment. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). That is what the original substantive (§§ 703(a), (c)) and remedial (§ 706(g)) provisions of Title VII declared. That is what the legislation's sponsors stated again and again throughout the debates. Sections 703(h) and (j) were added—at the insistence of those whose votes were

[27] *Ibid.*, 3092.

necessary to break the filibuster and enable passage of the bill—merely to make doubly sure that the statute could not be subject to any other construction.

In the next section, we will show that the statute, properly construed, entitles petitioners to the remedy they seek. We pause first, however, to observe that there are two aspects of petitioners' analysis of the legislative history with which we disagree.

First, petitioners urge (brief, pp. 28-30) that the legislative interpretations proffered by Senators Clark and Case in an effort to quiet the fears that Title VII would accord preferential rights should be disregarded. In petitioners' view, these statements are not evidence of "the legislative purpose" because they were made "weeks before § 703(h) was conceived." The contention that the interpretations of a bill submitted in writing by its floor managers should be disregarded would in any context be a startling one. In the context of the debate over Title VII it is absurd. Here, as in *Pipefitters* v. *United States*, 407 U.S. 385 (1972), sponsors struggling to secure a necessary 2/3 majority sought to reassure colleagues of their bill's limited reach.[28] This Court recognized that sponsors' explanations of their bill's meaning, which are "entitled in any event to great weight, [are] in this instance controlling." *Id.* at 409. Moreover, the legislative history of Title VII, recounted above, shows clearly the significance of the Clark-Case materials. They explained the bill's meaning before §§ 703(h) and (j) were added, and as Senator Humphrey explained, the latter provisions merely reiterated "what we have maintained all along about the bill's intent and meaning." Leg. Hist. 3005.

[28] In *Pipefitters*, a 2/3 majority was needed "to overrule a predictable veto" of the Taft-Hartley Act. Here, a 2/3 majority was required to terminate an ongoing filibuster.

This Court's analysis of the legislative history in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434-436 (1971), confirms, albeit in another context, that the Clark-Case materials constitute authoritative evidence of Congressional intent. The Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae (p. 18) likewise recognizes these materials to be authoritative.

Second, petitioners contend that § 703(h) applies only to the question whether a violation has occurred, and not to the question of what remedies may be provided once violations have independently been found. It is difficult to perceive what benefit petitioners would derive from this distinction, since there is an express prohibition of preferential remedies contained in the last sentence of § 706(g), the bill's remedial provision. In any event the distinction is unsound. While it is true that § 703(h), read literally, talks only in terms of violation, the legislative debates, as shown above, make clear that the considerations which eventuated in the addition of that section encompassed concern for the scope of remedy as well as for the definition of violation. On this point, this case is analytically indistinguishable from *Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). The Court dealt there with the relationship between § 8(d) of the NLRA, which states that an employer does not violate his duty to bargain by refusing to agree to a union proposal, and § 10(c), which empowers the NLRB to provide such affirmative remedies against violators "as will effectuate the purposes of the Act." The Court of Appeals, noting that § 8(d) is phrased in terms of violation, held that it did not preclude the Board from directing an employer to agree to a union proposal as a remedy for violations independently found. This Court rejected the attempted distinction, noting that "the same considerations

that led Congress" to prohibit findings of violations on that basis likewise dictated that that result not be accomplished through remedy-formulation:

> "In reaching this conclusion the Court of Appeals held that § 8(d) did not forbid the Board from compelling agreement. That court felt that "[s]ection 8(d) defines collective bargaining and relates to a determination of *whether* a . . . violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred." 128 U.S. App. D. C., at 348, 389 F.2d, at 299. We may agree with the Court of Appeals that as a matter of strict, literal interpretation that section refers only to deciding when a violation has occurred, but we do not agree that that observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d). It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute." [20]

The *Porter* analysis is particularly apposite, for § 10(c), there construed, was the model for Title VII's remedial provision, § 706(g). *Albemarle*, 43 L.W. at 4884-85. Thus, while § 703(h) literally talks in terms of whether a violation has occurred, it expresses a Congressional policy which precludes the fashioning of remedies inconsistent with its underlying purpose.

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[20] 397 U.S. at 107-108 (emphasis in original).

B. The Relief Sought by Petitioners is Fully Consistent with, and Effectuates, the Congressional Objectives.

This case involves employees who were originally denied employment because of their race. The court below has furnished them a portion of the relief necessary to make them whole for the discrimination they suffered: it has ordered that they receive backpay for the period during which they were unlawfully denied employment. While that remedy compensates the employees for the period prior to their obtaining employment, it does not make them whole for the period thereafter.

If an employee who was discriminatorily denied employment in 1970, and who instead was hired in 1972, is accorded a 1972 seniority date, his employment career in many respects will be inferior to that which he would have enjoyed had he been hired in 1970. Seniority serves many functions in the industrial setting, and a reduced seniority standing disadvantages an employee as to each.

1. *Seniority as a measure of fringe benefit entitlement.* Although seniority is most often thought of as a means of resolving competition between employees, it serves important non-competitive functions as well. In order to earn a pension an employee must accumulate a designated number of years of service with his employer. The number of weeks of vacation which he will receive almost always increases as his seniority increases. Entitlement to other fringe benefits, such as insurance and supplemental unemployment benefits, may not take effect until he has accumulated a specified amount of seniority. An employee who is accorded a 1972 seniority date will not enjoy these benefits as fully as if he had been hired in 1970 with a 1970 seniority date.

2. ***Protection in layoff situations.*** When it becomes necessary to reduce a workforce, the nearly universal practice in American industry is to lay off employees in inverse order of their seniority. When it later becomes necessary to increase the workforce, employees are recalled from layoff in the order of their seniority. The denial of two years' seniority may spell the difference between an employee remaining continuously at work or suffering months or years of layoff.

3. *Promotional opportunities.* In most industrial settings, seniority determines which of several qualified employees will be awarded a promotional opportunity, and conversely which will be able to retain a preferred job when it is necessary that some be reduced to lower-paying jobs. The employee who is denied two years' seniority will wait longer to secure promotions, and will be "bumped" more quickly to lower-paying jobs during periods of reduced employment.

4. *Seniority for other competitive purposes.* Seniority is also used to resolve other forms of employee competition. It is often used, for example, to determine which employees may take their vacations in the more desirable months, which employees will work the day shift rather than the night shift, and which employees will have first opportunity to perform overtime work (or, for that matter, which will have the right to refuse overtime work). In industries such as air, rail and trucking, seniority is also used to determine which employees will have the most attractive "runs." It is self-evident that in all of these respects, the denial of two years' seniority may substantially affect the work opportunities and life-style available to an employee.

The only way a discriminatee can be made whole is to give him the seniority date he would have had but for the

refusal to hire him. That "rightful place" remedy not only effectuates Congress' desire that discriminatees be made whole, it also preserves the integrity of seniority systems. Unions and employees have favored seniority as the determinant of employee competition because it furnishes an objective and equitable basis for allocating employment opportunities. But the system remains equitable only if all employees are given their proper seniority measure. Equity does not exist if some employees have had their seniority artifically reduced by the employer's discriminatory behavior. Reflecting this reality, the "rightful place" remedy has long been deemed an implicit part of collectively bargained seniority. When employees are discharged in violation of contract, unions invariably demand that they be reinstated without interruption of seniority, and arbitrators invariably grant that remedy.[30]

The correctness of this result in Title VII cases is further confirmed by the decisions under § 10(c), the remedy provision of the NLRA, upon which Title VII's remedial provision "was expressly modeled." *Albemarle*, 43 L.W. at 4884. The Board invariably awards "rightful place" seniority to applicants discriminatorily denied employment. In *Phelps Dodge Corp* v. *NLRB*, 313 U.S. 177 (1941), this Court affirmed an NLRB order requir-

[30] "An employee who is discharged but later reinstated through the grievance procedure . . . is to have the work days he lost applied to his seniority." *P.M. Northwest Co.*, 42 L.A. 961, 964 (Daniel Lyons, 1964). See also, *Jordanos Markets, Inc.*, 63 LA 345, 350 (Marshall Ross, 1974) ("full seniority"); *BASF Wyandotte Corp.*, 63 LA 121, 126 (Elliot Beitner, 1974) ("with full seniority"); *Inland Lumber Co.*, 62 LA 1151, 1154 (Henry C. Wilmoth, 1974) ("without loss of seniority"); *North American Rockwell Corp.*, 62 LA 901, 909 (Martin E. Conway, 1974) ("with complete seniority"); *Amoco Oil Co.*, 61 LA 10, 14 (Bernard Cushman, 1973) ("with seniority rights unimpaired").

ing that applicants who had been discriminatorily denied employment be awarded jobs "without prejudice to their seniority or other rights and privileges." 19 NLRB 547, 600 (1940). In explaining why the Board had power to order "reinstatement" of rejected applicants, this Court declared: "Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other." *Id.* at 187.

In *Nevada Consolidated Copper Corp.*, 26 NLRB 1182, 1231 (1940), enforced, 316 U.S. 105 (1942), the Board made more explicit the remedy to which discriminatorily rejected applicants were entitled: "the same or substantially equivalent positions at which they would have been employed, including any seniority or other rights or privileges they would have acquired had the respondent not unlawfully discriminated against them."[31]

We have shown thus far that Title VII does not *preclude* awards of seniority which put discriminatees in their rightful place. A related question is to what extent the district courts retain *discretion* to withhold the remedy on the basis of countervailing considerations in particular cases. Here, too, as *Albemarle* explained, the NLRA provides important guidance, for we "may assume that Congress was aware that the Board, since its inception, has

[31] See also *Consolidated Dairy Products*, 194 NLRB 701 (1971); *W.B.W. Services, Inc.*, 190 NLRB 499 (1971); *Great Lakes Dredge & Dock Co.*, 169 NLRB 631, 635 (1968); *The Hughes Corporation*, 135 NLRB 1222, 1223 (1962); *Atlantic Maintenance Co.*, 134 NLRB 1328, 1330 (1961), enforced, 305 F2d 604 (3d Cir. 1962); *Lamar Creamery Co.*, 115 NLRB 1113, 1115 (1956), enforced, 246 F2d 8 (5th Cir. 1957); *Pacific American Shipowners Association*, 98 NLRB 582, 601 (1952).

awarded ['rightful place' seniority remedies] as a matter of course—not randomly or in the exercise of a standardless discretion, and not merely where employer violations are peculiarly deliberate, egregious or inexcusable." 43 L.W. at 4885.[32]

In sum, the "rightful place" remedy has always been recognized as an integral component of an equitable seniority system. It must be awarded if employees are to be made whole for the discrimination they have suffered. It is in no sense "preferential."[33] It is, accordingly, wholly consis-

[32] In light of this standard, we think there could be few, if any, cases where there would be justification for denying a discriminatee his "rightful place" seniority for fringe benefit, layoff, recall, promotion or demotion purposes (categories 1, 2 and 3 discussed at pp. 24-25, *supra*). There might be instances, however, where a court could justifiably conclude that it would be unfair to permit the immediate full use of "rightful place" seniority for the types of purposes listed in category 4, *supra*. For example, if all employees are required at the outset of their employment to endure adverse working conditions (e.g., night shift, undesirable runs, etc.), it might be a windfall to allow one to escape those conditions altogether. Of course, even for these purposes it would be necessary to invest the discriminatee with his full seniority after some initial "running of the gauntlet," lest he be forever deprived of the more desirable working conditions available only to the most senior employees.

[33] Ironically, the court below had no difficulty recognizing the propriety of the rightful place remedy in that portion of this case which is not before this Court. Those employees who had been discriminatorily assigned at the time of hire were awarded the right to transfer with company seniority, so that they would be able to reach the jobs in their new departments which they would be holding had they never been discriminated against. 495 F.2d at 414-417. The "rightful place theory dictates that we give the transferring discriminatee sufficient seniority carryover to permit the advancement he would have enjoyed, and to give him the protection against layoff he would have had, in the absence of discrimination." *Bing* v. *Roadway Express*, Inc., 485 F.2d 441, 450 (5th Cir. 1973).

tent with the congressional objectives embodied in Title VII.[33a]

As we have shown, analysis of this case from the proper perspective—first identifying the dual congressional objectives, and then evaluating the remedy sought in light of those objectives—leads to the same result in this case as petitioners reach, albeit by a different path. But as we noted at the outset, the importance of articulating the correct analytical standard lies in its impact upon other cases, presenting a different issue, which are already reaching this Court's doorstep. So that the Court is aware of that other issue, and its ramifications, we briefly describe it in the next section.

C. The "Last In, First Out" Layoff Cases, and the Implications of the Congressional Determination to Preclude Preferential Treatment

In recent years, as the nation has entered a recession and employees have begun to be laid off in large numbers, a new Title VII issue has arisen. Young minority and female workers are contending that they should be afforded

Accord: *Robinson* v. *Lorilard Corp.*, 444 F.2d 791, 795-800 (4th Cir. 1971); *U.S.* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 660-661 (2nd Cir., 1971); *U.S.* v. *N.L. Industries, Inc.*, 479 F.2d 354, 374-375 (8th Cir., 1973); *Bowe* v. *Colgate Palmolive Co.*, 489 F.2d 896, 901 (7th Cir. 1973); *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 419 (6th Cir. 1974); *EEOC* v. *Detroit Edison Co.*, 10 FEP Cases 239, 250 (6th Cir. 1975).

[33a] As explained in the Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, p. 18, this statement is not applicable to discriminatory refusals to hire prior to the effective date of the Act (July 2, 1965), as Congress made a deliberate judgment to preclude "rightful place" remedies for pre-Act discrimination. In the instant case the discrimination occurred after the effective date of the Act, and thus that exception has no application here.

special seniority protections against layoff, *not* because they themselves have been discriminated against, but because discrimination against others has produced a situation in which preferential protection against layoff is the only way to preserve racial or sexual balance in the workforce.

The decision which has fueled the controversy is *Watkins* v. *United Steelworkers of America*, 369 F.Supp. 1221 (E.D. La., 1973), pending on appeal to the Fifth Circuit as No. 74-2604. In *Watkins*, the company historically had hired only white employees, but in recent years began hiring young blacks as they graduated high school and entered the job market. The company came upon hard times, and found it necessary to lay off half of its workers. Under the terms of the collective bargaining agreement, layoffs were made in inverse order of seniority. Only those employees who had been hired before 1952 were kept at work. All whites hired thereafter, and all the blacks hired in recent years, were laid off.

The recently-hired blacks instituted an action contending that the company had violated Title VII by laying them off. These employees did not contend that they had suffered any prior discrimination; indeed, they conceded that they had been hired as soon as they applied. They noted, however, that the company had discriminatorily refused to hire a prior generation of blacks, and thus that there were no blacks in the workforce with sufficient seniority to survive the layoff. They sought a remedy which would keep themselves at work, while requiring the layoff of whites who had been hired in 1951. They reasoned that this remedy was appropriate in order to preserve the integrated character of the workforce.

The district court ruled in favor of the plaintiffs. It directed the company to establish separate black and white seniority lists, and to lay off employees separately from those two lists in such a manner that the percentage of black employees in the workforce would remain the same after layoff as before. The practical effect of the district court's order, of course, was to provide a seniority preference to young black workers over whites who had been hired before they were born.

The district court's ruling in *Watkins* is an example of what Congress intended not to allow under Title VII, and what §§ 703(h) and (j) were enacted to make doubly sure could not occur. Manifestly, the plaintiffs in *Watkins* were not being awarded their "rightful place"—they were already in their "rightful place"—but rather were being given special rights to make up for the fact that their ancestors had been victimized by the company's prior discrimination. The district court acknowledged that its remedy was "preferential," and that the beneficiaries would be "persons other than those who were victims of the original discrimination." 369 F.Supp. at 1231. But the court thought these objections were outweighed by the need "to insure that, because the Company hired no blacks for twenty years, the plant will not operate without black employees for the next decade." *Ibid.*

The courts of appeals—including the Seventh Circuit in the *Waters* case now pending on petition for certiorari—have rejected the *Watkins* analysis, and have construed Title VII as not authorizing remedies for those who cannot prove that they have suffered discrimination.[34] These courts have concluded that Congress did not intend the

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[34] *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1317-20 (7th Cir. 1974), petition for certiorari pending, No. 74-1064; *Jersey*

courts to deprive senior employees of their jobs in order to make room for junior minority and female employees who, although not themselves the victims of discrimination, seek reparations for discrimination visited upon others.

These appellate repudiations of the *Watkins* holding derive additional support from the courts' universal rejection of preferential seniority remedies in the one other context in which they have been sought. In several of the discriminatory assignment cases (see pp. 28-29, n. 33, *supra*), discriminatees have sought remedies which would yield them a seniority status superior to their rightful place. The courts have rejected those requests, and awarded the discriminatees only rightful place seniority. In *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968), Judge Butzner, declaring that "the [legislative] history leads the court to conclude that Congress did not intend to require 'reverse discrimination,'" *id.* at 516, rejected a portion of plaintiffs' proposed remedy which "would prefer Negroes even though they might have less seniority than whites. Nothing in the Act indicates this result was intended." *Id.* at 519. Similarly in *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441, 451 (5th Cir. 1973), the court rejected a proposal which would have yielded discriminatees "more seniority than they would have had in the absence of discrimination." Accord: *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974); *Rodriguez* v.

Power Central & Light Co. v. *International Bhd. of Electrical Workers*, 508 F.2d 687, 705-710 (3rd Cir. 1975); *U.S.* v. *Local 189, United Papermakers*, 416 F.2d 980, 994-995 (5th Cir. 1969) (dictum), cert. denied, 397 U.S. 919 (1970). Accord: *Cox* v. *Allied Chemical Corp.*, 392 F. Supp. 309, 318-320 (M.D. La. 1974). Contra: *Loy* v. *City of Cleveland*, 8 FEP Cases 614 (N.D. Ohio 1974); *Delay* v. *Carling Brewing Co.*, 10 FEP Cases 164 (N.D. Ga. 1974); *Schaefer* v. *Tannian*, 10 FEP Cases 897 (E.D. Mich. 1975).

East Texas Motor Freight, 505 F.2d 40, 63-64 and n. 30 thereat (5th Cir. 1974).

II. This Case Should Not Be Decided on the Basis of 42 U.S.C. § 1981.

A. As an alternative ground for reversal petitioners invoke § 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. They contend that § 1981 was violated by the refusal to hire them and that the appropriate remedy for that violation is not affected by § 703(h) of the 1964 Act. As we have shown, petitioners are entitled to prevail in this case because neither § 703(h) nor any other provision of the 1964 Act prevents giving "rightful place" seniority to an individual who was denied a job because of his race. It is therefore not necessary to consider in this case the interrelationship between the 1866 and 1964 statutes. And it would be entirely inappropriate to decide this case on the basis of the earlier Act because petitioners relied exclusively on the 1964 Act when, in the court of appeals, they challenged the district court's denial of seniority credit. The court of appeals' failure to discuss § 1981, which petitioners criticize here (br. 40) is therefore readily understandable. As this Court stated in an earlier civil rights case, *Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144, 147, n. 2 (1970):

> "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. Lawn v. United States, 355 U.S. 339, 362-363, n. 16 (1958); Husty v. United States, 282 U.S. 694, 701-702 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927). We decline to do so here."

B. While we submit that no question under the 1866 Civil Rights Act need or should be reached in this case, we briefly state our understanding of that statute and its relationship

to the 1964 Act. Here again, our views differ from those of the petitioners, although not in a manner which would affect the outcome of the present action. In *Johnson* v. *Railway Express Agency, Inc.*, 43 L.W. 4623, 4625 (May 19, 1975), this Court joined the courts of appeals which had held "that § 1981 affords a federal remedy against discrimination in private employment on the basis of race,"[35] and declared that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."

Where, as here, individuals have been refused a job because of their race, the award to them of "rightful place" seniority is, for the reasons stated at pp. 24-29 *supra*, "suitable" (42 U.S.C. § 1988). Therefore, there is no inconsistency in this case between the remedial provisions of the 1866 Act (§ 3 of which is now 42 U.S.C. § 1988)[36] and any provision of the 1964 Act. Conversely, there is no conflict between the two statutes with respect to the individual who, as in the *Watkins*-type situation, has not been discriminated against on the basis of race. This is true be-

[35] Since the present case involves discrimination in hire, we have no occasion to discuss the scope of the substantive right created by § 1981 with respect to employment matters other than refusal to hire. That question is raised in the Cross-Petition for Certiorari in the *Waters* litigation, *United Order of American Bricklayers, etc.* v. *Waters*, No. 74-1350, pp. 2, 17.

[36] Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or

cause one who is not a discriminatee has no cause of action under the 1866 Act. Plainly, the basic policy of Title VII against giving anyone preference in employment because of his race is that of the 1866 Act as well, as appears from the language of § 1, "all persons • • • shall have the same right • • • as is enjoyed by white citizens • • •." That the 1866 and 1964 Acts, whatever their other differences (cf. *Johnson*, 43 L.W. at 4625), are identical in this particular was well stated by the Court of Appeals for the Sixth Circuit in *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 (1974) (footnotes omitted):

> "Section 1981 is by its very terms, however, not an affirmative action program. It is an equalizing provision, seeking to ensure that rights do not vary according to race. It does not require that persons be accorded preferential treatment because of their race. On this point we view the Supreme Court's discussion of Title VII as applicable to Section 1981:
>
> 'Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required

are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R. S. § 722.)

by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' Griggs v. Duke Power Co., 401 U.S. 424, 430-431."

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully submitted,

J. Albert Woll
Robert C. Mayer
736 Bowen Bldg.
815 Fifteenth St., N.W.
Washington, D.C. 20005

Laurence Gold
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for AFL-CIO

Michael H. Gottesman,
Elliot Bredhoff,
Robert M. Weinberg,
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

Bernard Kleiman,
Carl Frankel,
Five Gateway Center
Pittsburgh, Pa. 15222

Jerome A. Cooper,
John C. Falkenberry,
409 North 21st Street
Birmingham, Ala. 35203

James W. Dorsey,
100 Peachtree Street, N.W.
Atlanta, Georgia 30303

Attorneys for USWA